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### The Legal Regime of Protection of the Right to Freedom of Expression in the Inter-American System

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## The Legal Regime of Protection of the Right to Freedom of Expression in the Inter-American System

Claudio Grossman

### Introduction

The right to freedom of expression is essential for the protection of rights in the Americas. It is easy to understand that denouncing violations of human and civil rights would not be possible without the ability to exercise the right to free expression, especially the right to free speech. But, the importance of the right to freedom of expression goes well beyond. In fact, it can also help prevent mass and gross violations of human rights by bringing society's attention to initial, isolated rights violations that, if not properly addressed, could become a slippery slope, leading to the destruction of democratic values.

There is a constant need for assessment and evaluation in all democratic societies. Democracy is perfectible, and ensuring a vigorous, vibrant debate of human rights is an essential mechanism for im-

provement. It is necessary that these debates focus on traditional areas of weakness within democracies, such as the improvement of administration of justice and protection against discrimination. Additionally, in an ever-changing world, there is also need to address new challenges, like the scope of privacy in a world facing profound technological development and the eradication of corruption amidst the challenges created by new forms of criminality.

This article examines the role the Inter-American System has played in protecting the right to freedom of expression; and, in particular the interpretation of the relevant provisions of the American Convention on Human Rights and American Declaration on Human Rights by the Inter-American Court of Human Rights. In analyzing this field, it is critical to understand it is an area of constant evolution with

ever emerging new challenges. What remains constant is the *value* of the normative process identified in the Inter-American System. This process relies upon the supervisory organs and their jurisprudence to secure a realization of the right to freedom of expression that gives full effect to its scope and crucial role in protecting the exercise of every other right in a democratic society.

### I. Protection of the Right to Freedom of Expression in the Inter-American System

The right to freedom of expression in the Inter-American System is regulated by Articles 13 and 14 of the American Convention,<sup>2</sup> as well as by Article 4 of the American Declaration.<sup>3</sup> This paper focuses on protection of the right to freedom of expression under the American Convention. Several factors, however, have led to the emergence of a unified legal regime on the right to freedom of expression under both the American Convention and the American Declaration. This is partly due to the fact that the Convention elaborates on the content of human rights obligations laid down by the American

Declaration, including the right to freedom of expression. In addition, the interpretations and scope of this right under both documents are conducted by the same organ, i.e., the Inter-American Commission on Human Rights. As a result, a unified regime has emerged.

#### A. The Scope of Freedom of Expression

Subsection 1 of Article 13 of the American Convention establishes the right of individuals to think and express themselves freely.<sup>4</sup> It also details what freedom of expression means - “to seek, receive, and impart information and ideas of all kinds, regardless of frontiers” - and emphasizes that the medium used is irrelevant, as expression can be communicated “either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.”<sup>5</sup>

The jurisprudence of the Commission and the Court interprets the right to freedom of expression as prohibiting prior censorship and authorizing only the subsequent imposition of liability, except in exceptional situations laid down by Article 13 (4) for the *moral*



*protection* of young people.<sup>6</sup> It has also established the scope of permissible restrictions of this right that may apply in emergency situations.<sup>7</sup> All forms of speech are protected by the right to freedom of expression, including speech that is offensive, shocking, or disturbing to the state or other groups.<sup>8</sup> The Inter-American System has found that freedom of expression includes the right to denounce human rights violations by public officials.<sup>9</sup> This highlights the connection between the Inter-American System’s role in protecting speech and guaranteeing access to justice, which are both crucial to the fight against impunity.<sup>10</sup>

The Inter-American System has also identified three different types of specially protected speech,<sup>11</sup> which include:

A. political speech and speech involving matters of public interest;

- B. speech regarding public officials in the exercise of their duties and candidates for public office;
- C. speech that is an element of the identity or personal dignity of the person expressing herself.

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These forms of specially protected speech demonstrate the connection existing between speech and democracy; they encourage vibrant debate. Candidates and public officials should be subject to more public and

voter scrutiny because they chose to enter into the public domain. The effort to protect speech that is connected to identity is intended to protect vulnerable groups, highlighting the fact that democracy is strengthened when everyone in society is heard and counts. These categories of speech are particularly relevant in balancing different factors when assessing liability. Both the Commission and Court have repeatedly affirmed that in the Inter-American System there is a strong connection between the right to freedom of expression and democracy.<sup>12</sup>

The interpretative work of the Commission and the Court has resulted in the following characteristics of the scope of freedom of expression within the context of the Inter-American System:

- A. special dual character;
- B. indivisibility of expression and dissemination of ideas;
- C. multiplicity of forms of expression;
- D. protection of the means required to disseminate ideas;
- E. protection of reproduction of expression;
- F. exclusion of direct and indirect restrictions; and

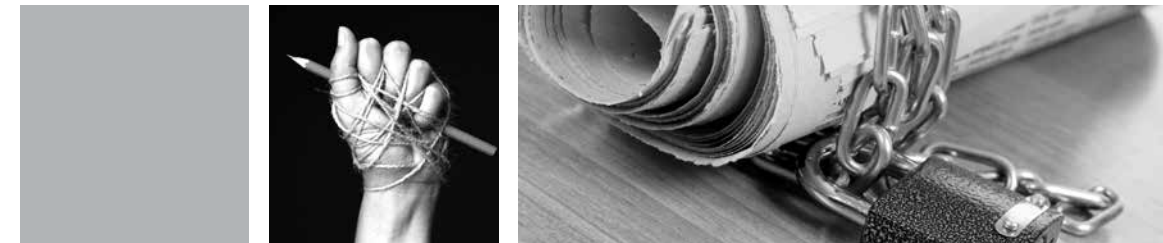
G. incompatibility of public and private monopolies in information media with the right to freedom of expression.

### 1. Special Dual Character

Freedom of expression possesses a special dual character in that it not only involves the right of individuals to *express* themselves, but also the right to *receive* information and ideas.<sup>13</sup> Thus, as the Court explains in its Advisory Opinion OC-05/85, a violation of the right to freedom of expression not only infringes on an individual right, but also on “a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.”<sup>14</sup>

The Court advanced this interpretation in the case *The Last Temptation of Christ*, where it held “freedom of expression is a way of exchanging ideas and information between persons; it includes the right to try and communicate one’s point of view to others, but it also implies everyone’s right to know opinions, reports, and news.”<sup>15</sup>

The *Baruch Ivcher-Bronstein v. Peru* case expands on this dual charac-



ter. The case was initiated when the Peruvian government deprived the majority shareholder and director of the Peruvian television channel *Frecuencia Latina-Canal 2* (Latin Frequency-Channel 2) of his Peruvian nationality. The government’s action was in retaliation for the channel’s broadcast of various reports of human rights violations committed by the Fujimori regime in Peru during 1990-2000.<sup>16</sup>

Because foreigners could not own television or radio stations in Peru, the removal of Ivcher-Bronstein’s Peruvian citizenship resulted in his forced withdrawal from the directorship of the channel. The new owners fired the journalists who produced the programs and ceased the broadcast of negative news about the regime.<sup>17</sup> While litigating this case, the Commission asserted that the social character of the right to freedom of expression was much broader than its individual aspects;

it protects all those who seek out and receive information or opinions emitted by the media.<sup>18</sup> In this case, the Commission argued, and the Court upheld, that *all of society* is victimized when an individual’s freedom of expression is violated.<sup>19</sup>

The Commission has had several opportunities to discuss this characteristic further. In the case of *Martorell v. Chile*, where censorship of the book *Impunidad Diplomática* (Diplomatic Impunity) was at issue, the Commission asserted that, “arbitrary interference that infringes this right affects not just the individual right to express information and ideas but also the right of the community as a whole to receive information and ideas of all kinds.”<sup>20</sup>

The Commission expanded upon this interpretation in *Oropeza v. Mexico*. In this case, a Mexican journalist was allegedly assassinated for



criticizing government authorities in his newspaper column, which included references to links between the police and drug trafficking.<sup>21</sup> The Commission affirmed that freedom of expression is a universal legal concept in which individuals are able to express, transmit, receive, and disseminate thoughts.<sup>22</sup> Accordingly, both the Commission and the Court have consistently reaffirmed the dual character of the right of freedom of expression.

Unfortunately, the most brutal form of silencing freedom of expression, the killing of journalists, continues to exist in the region. According to the most recent report of the Special Rapporteur of Freedom of Expression, 22 journalists and other media workers were killed in 2017, and several others were disappeared or dislocated.<sup>23</sup> The Special Rapporteur expressed concern that these acts of violence against journalists had a chilling effect on both the individual reporting of journalists that felt threatened and entire media outlets that chose to abandon coverage or avoid sensitive areas.<sup>24</sup> This chilling effect can produce *zones of silence* and ultimately result in

an under-informed public. These “zones of silence” would seem to undermine the “collective right to receive any information” expounded in *Advisory Opinion OC-05/85*.

## 2. Indivisibility of Expression and Dissemination of Ideas

In *Advisory Opinion OC-05/85*, the Court defined the scope of *indivisibility* of expression and dissemination, stating: “restrictions that are imposed on dissemination represent . . . a direct limitation on the right to express oneself freely.”<sup>25</sup> Furthermore, it asserted the importance of the legal rules applicable to the press derives from this concept.<sup>26</sup> Finally, it added that “[f]or the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinions.”<sup>27</sup>

The Court had an opportunity to expand on this issue in *Palamara Iribarne v. Chile*. In that case, the Chilean government seized and destroyed all hard and electronic copies of the book *Ethics and Intelligence Services* and prohibited its distribution.<sup>28</sup> The Court held that, in guaranteeing the right to

freedom of expression, the State must not only protect the individual expression itself, but also its dissemination “through whichever appropriate medium.”<sup>29</sup>

The Commission took an analogous approach in *Martorell v. Chile*, where it stated that “the decision to ban the entry, circulation, and distribution of the book *Impunidad Diplomática* in Chile violates the right to impart information and ideas of all kinds,”<sup>30</sup> protected under the right to freedom of expression.

Similarly, in *Miranda v. Mexico*, the Commission found the failure to investigate and punish the mastermind behind the assassination of a journalist constituted an illegal interference with the right of every citizen to “receive information freely and to learn the truth about the events that took place.”<sup>31</sup> In this case, the co-director of a Mexican weekly publication was assassinated for authoring and publishing opinions critical of the government.<sup>32</sup> As these cases demonstrate, the jurisprudence of the Inter-American System has strongly upheld the indivisibility of expression and dissemination of ideas.

## 3. Multiplicity of Forms of Expression

The right to freedom of expression is not limited to verbal expression; all types of expression are protected, including silence.<sup>33</sup> This right also extends to expression in the form of protest.<sup>34</sup>

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The *Jehovah’s Witnesses v. Republic of Argentina* case is an example of the broad scope of the right to freedom of expression developed by the Inter-American jurisprudence. In 1976, the Argentine military dictatorship promulgated Decree No. 1867/76, which prohibited the public exercise of the Jehovah’s Witness religion in Argentina.<sup>35</sup> The government alleged that this religion was based on principles contrary to the Argentine nationality and basic State institutions.<sup>36</sup>

As a result of the decree, followers of the religion were persecuted.<sup>37</sup> More than 300 children were expelled from school after being accused of refusing to swear allegiance to the country or to sing the Argentine National Anthem.<sup>38</sup> The students opted instead for silence because their religion prohibited them from engaging in such veneration of national symbols.<sup>39</sup> Pursuant to Resolution No. 02/79, the Commission condemned of the Argentine government's action, which it considered to be responsible for the alleged violations.<sup>40</sup>

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"As exemplified by the Commission's resolution in the Jehovah's Witnesses case, all forms of expression, including silence, are protected under the right to freedom of expression. With this in mind, the attention drawn to the issue of unlawful quelling or regulating of protests in some states in the region by the Special Rapporteur for Freedom of Expression in his latest report, is very troubling."

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As exemplified by the Commission's resolution in the Jehovah's Witnesses case, all forms of expression, including silence, are protected under the right to freedom of expression. With this in mind, the attention drawn to the issue of unlawful quelling or regulating of protests in some states in the region by the Special Rapporteur for Freedom of Expression in his latest report, is very troubling. The Special Rapporteur received information on dozens of detentions, threats, and aggressions committed against journalists, protesters, and users of social networks that reported on protests.<sup>41</sup> As the Special Rapporteur points out, public protest is a critical medium of expression used by groups that are marginalized or discriminated against in traditional public forums.<sup>42</sup> Public protest is also a medium of expression protected under the American Convention.

#### 4. Protection of the Means Necessary to Disseminate Ideas

Having asserted the right to disseminate opinions and ideas, both the Commission and the Court determined that the American Convention provides that freedom of

thought and expression includes the right to disseminate information and ideas by any means.<sup>43</sup> In *Advisory Opinion OC-05/85*, the Court affirmed that "freedom of expression ... cannot be separated from the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible."<sup>44</sup> The Commission asserted in its complaint in the *Baruch Ivcher-Bronstein v. Peru* case, discussed above, that the American Convention consecrates the right to disseminate information and ideas in an artistic form or by any other means.<sup>45</sup>

Protection of the right to disseminate ideas was recently addressed in the latest report of the Special Rapporteur of Freedom of Expression where he stressed that regulations on use of the internet needed to be carefully calculated. The internet clearly has a vast potential for expression, dissemination, and consumption of ideas. Accordingly, the Special Rapporteur recommended that in evaluating the proportionality of restrictions of freedom of expression on the internet, "the impact that said restriction could have on the capacity of the internet to

guarantee and promote freedom of expression must be weighed against the benefits that restriction would provide for the protection of other interests."<sup>46</sup> Furthermore, it is important to stress the "benefits" restrictions could provide must remain grounded in international law, including the American Convention, and it is not enough that a government can claim a benefit of some kind to justify restrictions.

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#### 5. Protection of Reproduction of Information

The right to freedom of expression includes the right to reproduction of expression originating from others. In the *Herrera-Ulloa v. Costa*



*Rica* case, the State convicted the petitioner on the criminal charge of defamation based on the contents of several articles published by the newspaper *La Nación*.<sup>47</sup> These articles, which previously appeared in the Belgian press, attributed illegal acts to Costa Rica's honorary representative to the International Atomic Energy Agency in Austria.<sup>48</sup> Costa Rican law required that the petitioner prove the veracity of the facts reported in the European press, and later reproduced in *La Nación*, in order to avoid liability.<sup>49</sup> The Court found this standard to be incompatible with Article 13 of the Convention and that it "has a deterrent, chilling and inhibiting effect on all those who practice journalism . . . [that] obstructs public debate on issues of interest to society."<sup>50</sup>

Penalizing the reproduction of information originating from third parties, in the absence of malice or grave negligence, would seriously restrict the free flow of ideas in an increasingly complex global reality where information flows from multiple and often distant actors. The exclusion of liability for reproducing this type of information does not, however, imply exclud-

ing liability of those with whom the information originated (e.g., malicious statements of fact) or the liability of those who reproduce such information with malice or grave negligence.<sup>51</sup>

## 6. Exclusion of Direct and Indirect Restrictions

Subsection three of Article 13 of the American Convention prohibits restrictions on freedom of expression that are carried out by *indirect* means designed to impede communication.<sup>52</sup> The Special Rapporteur for Freedom of Expression has defined indirect measures as those that, although not "designed strictly speaking to restrict the freedom of expression...[n]onetheless, in practice . . . have an adverse impact on the free circulation of ideas."<sup>53</sup> Unlike direct restrictions, these are harder to detect and consequently, rarely investigated.

The *Baruch Ivcher-Bronstein v. Peru* case, discussed above, provides an example of an indirect restriction on freedom of expression. In this case, the government did not use traditional restrictions such as libel, contempt laws, cen-

sorship, or political persecution to silence Bronstein. Instead, the regime stripped him of his nationality to achieve this goal.<sup>54</sup>

Since then, Inter-American jurisprudence has expanded on the concept of indirect restrictions. In the *Canese v. Paraguay* case, the Commission recognized punitive measures as an indirect restriction to freedom of expression. Mr. Canese was a journalist who wrote about allegations of corruption against the powerful presidential candidate Juan Carlos Wasmosy. Canese was fired from the newspaper where he worked and criminal proceedings were brought against him. He was sentenced to four months' imprisonment and not allowed to leave Paraguay. The Commission stated that "[t]he inhibiting effect of the punitive measure can generate self-censorship of a person who wishes to speak out, which produces almost the same effect as direct censorship: 'opinions do not circulate.'"<sup>55</sup> In that case, the Court determined "the criminal proceeding, the consequent sentence imposed on Canese . . . and the restrictions to leave the country during almost eight years and four months constituted an indirect means of restrict-

ing his freedom of thought and expression."<sup>56</sup> Using that law to its fullest extent, the government limited "the open debate on topics of public interest or concern and restricted Canese's exercise of freedom of thought and expression to omit his opinions for the remainder of the electoral campaign."<sup>57</sup>

In a case addressing indirect restrictions, *Perozo et al. v. Venezuela*, the Court noted there must be an actual restriction of speech in order for a violation to occur.<sup>58</sup> In this case, the Court found the government of Venezuela had not violated the victim's rights *per se*, but had failed its obligation to protect the victim from indirect restrictions by private actors.<sup>59</sup>

For years, the Special Rapporteur for Freedom of Expression has also investigated indirect means employed to restrict this right as they emerge in the region, including government funding and tax benefits for government-friendly media outlets, threats of withdrawal of required licenses and permits from media outlets critical of the government, and the creation of new crimes related to new media, such as online libel, continue to persist.

Already in the 2003 Annual Report, the Rapporteur evaluated how the unregulated use of official publicity could be transformed into a restriction. For example, the abuse of funding distribution policies to benefit those who favor the government or its agents punishes those media agencies that seek a more critical approach. The Rapporteur illustrated that although “[t]here exists no inherent right to receive government advertising revenue. . . [the state] cannot deny publicity income only to specific outlets based on discriminatory criteria.”<sup>60</sup> Unfortunately, this trend continues to be found in the Special Rapporteur’s most recent report where he recounts complaints pertaining to distribution of government advertising intended to punish or reward media outlets based on their editorial positions.<sup>61</sup> Furthermore, the 2017 Report stressed concern over the threatened withdrawal of operating concessions, permits, or licenses of critical media outlets.<sup>62</sup>

The Rapporteur reminded State authorities of their positive duty to build an environment of tolerance and respect to protect the dissemination of ideas.<sup>63</sup> Another concerning development highlighted by

the Rapporteur is the emergence of new crimes indirectly restricting freedom of expression. One example is the Latoya Nugent case in Jamaica where Nugent was arrested for naming alleged perpetrators of sexual violence on social media, in violation of the Cybercrimes Act.<sup>64</sup> The Rapporteur stressed that this type of double criminalization was inappropriate because it allows for aggravating circumstances relating only to the medium used, in this case social media.<sup>65</sup>

### 7. Incompatibility of Public and Private Monopolies in Information Media with the Right to Freedom of Expression

Both the Court and the Commission have confirmed the existence of public and private monopolies impedes the dissemination of individual ideas as well as the reception of the opinions of others. As a result, the existence of monopolies in the media industry is inconsistent with freedom of expression. In *Advisory Opinion OC-05/85*, the Court stated that “[i]t is the mass media that make[s] the exercise of freedom of expression a reality.”<sup>66</sup> To ensure that this medium is not restricted, the Court determined

there must be “a plurality of means of communication, the barring of all monopolies . . . and guarantees for the protection of the freedom and independence of journalists.”<sup>67</sup>

In *Baruch Ivcher-Bronstein v. Peru*, the Commission affirmed that the free circulation of ideas is only conceivable where there are multiple sources of information in addition to respect for the media.<sup>68</sup> The Commission explained that it is not enough to guarantee the right to establish mass media; it is also necessary that journalists and other professionals working in the media have the protections necessary to ensure they can work freely and independently in this space.<sup>69</sup>

Furthermore, the Special Rapporteur has stated that “assignments of radio and television broadcast frequencies should consider democratic criteria that guarantee equal opportunities of access for all individuals.”<sup>70</sup> In the most recent report of the Special Rapporteur of Freedom of Expression, the Rapporteur noted that the concentration of public and private media is still a problem in some countries.<sup>71</sup> The Rapporteur noted specific complaints regarding the

lack of recognition of the indigenous broadcasting sector in some countries and the absence of regulatory mechanisms to ensure access to these frequencies.<sup>72</sup> In a further expansion of the right of freedom of expression, the Inter-American Court, in the case of *Kimel v. Argentina*,<sup>73</sup> stated the “plurality of the media and the prohibition of all types of monopolies in relation thereto, whatever be the form they may adopt, is imperative.”<sup>74</sup> The Court thereby established a positive state obligation to adopt a normative framework that would guarantee the exclusion of monopolies in information media.

### B. Prohibition of Prior Censorship

One of the principal characteristics of the right of freedom of expression in the Inter-American System is that it only allows for *prior* censorship when used to regulate public entertainment in order to safeguard the morals of children and adolescents.<sup>75</sup> Subsection two of Article 13 of the Convention provides that freedom of expression cannot be subject to prior censorship, but “shall be subject to subsequent imposition of liabili-

ty.”<sup>76</sup> The Declaration of Principles holds that direct or indirect prior censorship restricts the free circulation of ideas and opinions, which violates the right to freedom of expression.<sup>77</sup>

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This prohibition responds to the danger of creating filters capable of determining what individuals can hear, see, or read. Therefore, the American Convention rejects resort to justifications such as “national security”, “morality”, or “good habits” that could easily be used as pretexts to eliminate or encroach upon the free expression of ideas. In the Western Hemisphere, both the Court and the Commission have had the opportunity to

interpret the prohibition of prior censorship including: (a) the exclusion of the defense of honor as a basis for prior censorship; and (b) identifying the scope of authorized exceptions.

### 1. Exclusion of Defense of Honor as a Basis for Prior Censorship

Some state parties have used the right to privacy found in Article 11 of the Convention<sup>78</sup> as a basis for restricting the right to freedom of expression protected in Article 13. The basis of their argument is that defense of honor should be excluded from the prior censorship prohibition. The state of Chile, for example, set forth this argument in *Martorell v. Chile*. The Chilean government and judiciary maintained that in the event of a conflict between Articles 11 (right to privacy) and 13 (right to freedom of expression) of the American Convention, the former must prevail.<sup>79</sup> In deciding the case, the Commission rejected this theory and advanced its interpretation that the rights included in those two articles of the American Convention do not present a conflict of different principles from which one must be chosen.<sup>80</sup>

Accordingly, the Commission quoted the European Court on Human Rights, which, in a similar case, considered that it was “faced not with a choice between conflicting principles, one of which is freedom of expression, but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted.”<sup>81</sup>

The Commission reiterated this interpretation of Article 13 in its arguments in *The Last Temptation of Christ*.<sup>82</sup> In that case, the Chilean government prohibited the distribution of the film “*The Last Temptation of Christ*,” arguing it did so to protect the “honor and reputation of Christ.”<sup>83</sup> The Commission, in turn, replied that the “honor of the individual should be protected without prejudicing the exercise of freedom of expression and the right to receive information.”<sup>84</sup> The Commission argued subsequent liability is “only admissible in a restricted way, when necessary to ensure respect for the rights or reputation of others.”<sup>85</sup> In deciding the case, the Court upheld the Commission’s reasoning and stated the prohibition of the movie *The Last Temptation of Christ* constitut-

ed prior censorship in violation of Article 13 of the Convention.<sup>86</sup>

The Special Rapporteur acknowledged this interpretation in the 1998 report, noting that States must respect the right to freedom of expression when legislating the protection of honor and dignity contained in Article 11 of the Convention and applying domestic law on the subject.<sup>87</sup>

### 2. Scope of Authorized Exceptions

The American Convention authorizes an exception to its prohibition of prior censorship: censorship of public entertainment for the *exclusive* purpose of regulating access to such events to protect the morals of children and adolescents.<sup>88</sup> This exception, however, is only permitted within the framework of the Inter-American System if it conforms to the requirements of:

- Legality: the exception must be authorized by law; decrees or other administrative measures would be insufficient.
- Necessity: implies a case-by-case evaluation of the pertinence of the measure, taking into ac-

count the peculiarities of each situation, and the lack of less restrictive means available to achieve the same valid purposes in order to exclude improperly-motivated prohibitions.

- Reality or Imminence: measures may be adopted in light of actually existing conditions or those that are certain to occur, not mere hypothetical situations that *could* affect the morals of children or adolescents (in public entertainments).
- Valid Purpose: corresponds to cases involving children where protection of morals is at issue.<sup>89</sup>

### C. Subsequent Liability

The Inter-American System's prohibition on prior censorship does not exclude *subsequent* imposition of liability. But when such liability is disproportionate, it effectively "gags" individuals who are faced with the threat of serious "retaliation" for expressing their opinions, producing a chilling effect for society at large. The American Convention sets forth specific requirements to establish the validity of subsequent liability. These requirements have been reflected in the jurisprudence of the Court.

One case in which the Court addressed subsequent liability is *Kimel v. Argentina*.<sup>90</sup> Kimel is an investigative historian who published a book entitled *La Masacre de San Patricio* in 1989.<sup>91</sup> The book analyzed the killings of five clergymen of the Palotine Order that occurred 4 July 1976 during the military dictatorship in Argentina.<sup>92</sup> Kimel examined the judicial investigation into the massacre and referred to a judicial decision adopted on 7 October 1977.<sup>93</sup> He raised questions concerning the behavior of the federal judge in charge of this case, alleging that

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the judge complied with formal requirements, but because of pressure from the military regime, had not investigated the truth.<sup>94</sup>

The judge brought a criminal action against Kimel for defamation or alternatively for "false imputation of a publicly actionable crime," both of which are punishable by up to three years in prison according to Argentine Criminal Code.<sup>95</sup> Kimel was found guilty of the latter and sentenced on 25 September 1995 to one year in prison and payment of 20,000 pesos<sup>96</sup> The Court found that the sentence violated the right to freedom of thought and expression laid down by the American Convention.<sup>97</sup> On the basis of Kimel, and some other court decisions, the following requirements for subsequent liability can be identified:

1. legality;
2. democratic legitimacy;
3. necessity;
4. proportionality;
5. value judgments;
6. differentiation between opinions based on facts and value judgments;
7. preclusion of liability for reproduction of information; and

8. strict regulation of contempt laws.

These requirements protect the right to freedom of expression in general, including, "those [forms of expression] that offend, shock or disturb the majority."<sup>98</sup>

Moreover, in applying these requirements in a given case, special consideration must be given to protected speech including, (a) political speech and speech involving matters of public interest; (b) speech regarding public officials in the exercise of their duties and candidates for public office; and (c) speech that is an element of the identity or personal dignity of the person expressing herself.<sup>99</sup> This type of speech is *essential* for democracy, and accordingly must be subject to rigorous scrutiny.

Unfortunately, in the 2017 Report by the Special Rapporteur on Freedom of Expression, criminal statutes in some countries still criminalize speech related to public officials and allow for the imposition of un-proportional measures "that can have the kind of chilling effect that is incompatible with a democratic society."<sup>100</sup>

#### D. The Right to Access Information

The right to access information is fundamental to the ongoing development of democracy. It is found in subsection one of Article 13 of the American Convention, which provides that the right to freedom of expression includes the freedom to seek out and receive information of all kinds.<sup>101</sup>

With respect to this issue, the Court has noted “a society that is not well informed is not a society that is truly free.”<sup>102</sup> Restrictions on access to information held by public or private institutions (e.g., credit institutions) must be “judged by reference to the legitimate needs of democratic societies and institutions.”<sup>103</sup> This implies the existence of an absolute prohibition on access to information is incompatible with the American Convention. Although exceptions and limited restrictions are possible (e.g., for national security reasons), they should be narrowly interpreted and subject to judicial review in all cases.

#### E. Right of Correction and Reply

Having established freedom of expression and thought in Article 13, the American Convention provides for a right of correction and reply in Article 14.<sup>104</sup> In *Advisory Opinion OC-07/86*, the Court asserted that these articles are inescapably related: “in regulating the application of the right of reply or correction, the States parties must respect the right of freedom of expression guaranteed by Article 13. They may not, however, interpret the right of freedom of expression so broadly as to negate the right of reply proclaimed by Article 14(1).”<sup>105</sup>

The Court added that the right to reply guarantees respect for freedom of expression in both its individual and shared dimensions. In the individual dimension, the Court recognizes that this right “guarantees that a party injured by inaccurate or offensive statements has the opportunity to express his [or her] views and thoughts about the injurious statements.”<sup>106</sup> The Court further recognized this right gives every person “the benefit of new information that contradicts or disagrees with the previous inaccurate or offensive statements.”<sup>107</sup>

In this respect, the rights act as a balance of information which is needed for the public to form a true and correct opinion.

#### F. Emergency Situations and Their Impact on Freedom of Expression

The regulation of emergency situations is of great importance to the protection of rights in general and to the protection of freedom of expression in particular. Emergency situations arise when there is a threat against the life of the nation. These situations permit restrictions on human rights, including the right to freedom of expression.

The requirements prescribed by the American Convention for the timely suspension of rights, including freedom of expression, are:

1. necessity, there must be absolutely no other possible alternatives in the case at hand;
2. timeliness, the suspension of rights must be valid strictly for the time required;
3. proportionality, measures adopted cannot be an excessive reaction on the part of the authorities in light of the existing emergency;

4. compatibility, measures adopted must be compatible with other duties imposed by international law;
5. non-discrimination; and
6. compliance with the law by the authorities.

The temporary suspension of rights supposes actions by authorities consistent with the law declared for reasons of general interest and for the purpose for which they were established.<sup>108</sup>

#### G. The Link Between Freedom of Expression and Democracy

Both the Court and the Commission have established that there is an inherent link between freedom of expression and democracy.<sup>109</sup> In *Advisory Opinion OC-05/85*, the Court affirmed that “[f]reedom of expression is a cornerstone upon which the very existence of a democratic society rests,”<sup>110</sup> and this freedom is essential for the development of political parties, trade unions, scientific and cultural societies, and those who wish to influence the public.<sup>111</sup>

As stated by the Special Rapporteur, when debate is restricted, the development of democracy is inter-

rupted because the free debate of ideas and opinion among citizens is impeded.<sup>112</sup> The link between freedom of expression and democracy has been part of the development process within the context of the OAS. Currently, only democratic States may become members of that Organization. An important milestone in this process was reached when OAS Resolution 1080 was adopted in Santiago, Chile in 1991.<sup>113</sup> It allows OAS political organs to take active measures, including diplomatic initiatives, when the constitutional process of a country breaks down.<sup>114</sup> The Inter-American Democratic Charter broadens the scope of situations that would warrant OAS actions,<sup>115</sup> referring specifically to freedom of expression. It was built on the jurisprudence cited above and determined that democracy provides the theoretical and practical ground to guarantee freedom of information, as a necessary structure to secure compliance with human rights.<sup>116</sup>

## Conclusion

The interpretations of the American Convention by the Court and the Commission have developed a

normative framework designed to protect freedom of expression in the Inter-American System. This framework addresses not only direct but also indirect attacks on the right to freedom of expression, including protections for speech criticizing public officials, restrictions on prior censorship, and positive obligations on countries to eliminate media monopolies and ensure a friendly environment for the dissemination of all ideas in any medium desired.

New forms of media and the rapid dissemination of information have created new challenges for states to grapple with, especially related to protection of privacy and new forms of corruption. These challenges make protecting the right to freedom of expression even more critical to ensure the protection of other fundamental rights. Achieving full protection of the right to freedom of expression in the Americas requires that states fully comply with existing regional norms and incorporate them into domestic law. As the most recent report of the Special Rapporteur on the Freedom of Expression shows, there is much room for improvement defending and protect-

ing this right. Because of the nature of litigation in the Inter-American System, its jurisprudence consists of reactions to alleged violations of the right to freedom of expression rather than proactive steps to promote the right. That being said, promotional steps are essential for the full realization of this right, especially concerning the right of freedom of expression of women, LGBTQ persons, and indigenous peoples, among others. Affirmative steps at the state level seem to be a

requirement in order to ensure the ability of all persons to exercise the right to freedom of expression.

Exercise of the right to freedom of expression is interwoven into the fabric of democracy and underpins the relationship between human rights and democracy. The inability to fully exercise the right to freedom of expression, jeopardizes the ability to exercise every other human right and removes the democratic power from the people.

<sup>1</sup> This article builds upon a prior article, incorporating recent developments in the law. Prior article published as *Challenges to Freedom of Expression Within the Inter-American System: A Jurisprudential Analysis*, published by the author in 34 Human Rights Quarterly 361-403 (2012), Johns Hopkins University Press.

<sup>2</sup> Article 13 of the American Convention expressly states:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

a. respect for the rights or reputations of others; or

b. the protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

Article 14 adds:

1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.

2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred.

3. For the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have a person responsible who is not protected by immunities or special privileges.

American Convention on Human Rights arts. 13, 14, 22 Nov. 1969, O.A.S. Doc. OEA/Ser.LV/11.23, doc. 21, rev. 6 (1976) O.A.S.TS. No.36, 1144 U.N.T.S. 143 (entered into force 18 July 1978) [hereinafter American Convention].

<sup>3</sup> Article 4 of the American Declaration provides that "[e]very person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever." American Declaration on the Rights and Duties of Man, art. 4, 2 May 1948, O.A.S. Doc. OEA/Ser.LN/II.71 (1988).

<sup>4</sup> American Convention, *supra* note 2, art. 13(1).

<sup>5</sup> *Id.*

<sup>6</sup> American Convention, *supra* note 2, art. 13(4).

<sup>7</sup> Office of the Special Rapporteur for the Freedom of Expression, Inter-American Legal Framework Regarding the Right to Freedom of Expression, Inter-Am. Comm'n H.R., OEA/Ser.LN//IICIDH/RELE/INF. 2/09, 67 (2010).

<sup>8</sup> *Id.* at 29-30.

<sup>9</sup> *Id.* at 42.

<sup>10</sup> See *Barrios Altos v. Peru*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75 (14 Mar. 2001) (following the process of elections that took place after the period of rampant human rights violations in the 1970s, amnesty laws were passed in many countries to cover the perpetrators of these crimes with immunity. The Inter-American Court ruled that this was against the Convention).

<sup>11</sup> Office of the Special Rapporteur for the Freedom of Expression, Inter-American Legal Framework Regarding the Right to Freedom of Expression, Inter-Am. Comm'n H.R., OEA/Ser.LN//IICIDH/RELE/INF. 2/09, 32 (2010).

<sup>12</sup> Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-05/85, Inter-Am. Ct. H.R. (ser. A) No. 5, 39 (13 Nov. 1985).

<sup>13</sup> *Id.* at 30.

<sup>14</sup> *Id.*

<sup>15</sup> *Olmedo-Bustos et al. v. Chile*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 73, 166 (5 Feb. 2001).

<sup>16</sup> See generally *Ivcher-Bronstein v. Peru*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 54 (6 Feb. 2001).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 31.

<sup>19</sup> See generally *id.*

<sup>20</sup> *Martorell v. Chile*, Case 11.230, Inter-Am. Comm'n H.R., Report No. 11/96, OEA/Ser.L/V/11.95, doc. 7 rev., 53 (1996).

<sup>21</sup> *Oropeza v. Mexico*, Case 11.740, Inter-Am. Comm'n H.R., Report No. 130/99, OEA/Ser.L.N./I.1 06 doc. 6, 51 (1999) (citing Annual Report 1980-1981, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II, at 122).

<sup>22</sup> *Id.*

<sup>23</sup> Report of the Special Rapporteur for Freedom of Expression 2017, Inter-Am. Comm'n H.R., O.A.S. Doc. OAS/Ser.L/V/II Doc. 210/17 v.2, 414 (2017) [hereinafter 2017 Report of the Special Rapporteur].

<sup>24</sup> *Id.*

<sup>25</sup> Advisory Opinion OC-05/85, *supra* note 12, 31.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 32.

<sup>28</sup> *Palamara-Iribarne v. Chile*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 135, 2 (22 Nov. 2005).

<sup>29</sup> *Id.* at 73.



<sup>30</sup> Martorell v. Chile, Case 11.230, Inter-Am. Comm'n H.R., Report No. 11/96, OEA/Ser.LN/11.95, doc. 7 rev. 59 (1996).

<sup>31</sup> Miranda v. Mexico, Case 11.739, Inter-Am. Comm'n H.R., Report No. 5/99, OEA/Ser.L.N.II.102 doc. 6, 56 (1998).

<sup>32</sup> *Id.*

<sup>33</sup> American Convention, *supra* note 2, art. 13(1).

<sup>34</sup> *Id.*

<sup>35</sup> Jehovah's Witnesses v. Republic of Argentina, Case 2137, Inter-Am. Comm'n H.R., Report No. 45/78, OEA/Ser.L.N.I.47, 1 1 (1978).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 4-7.

<sup>38</sup> Claudio Grossman, *Freedom of Expression in the Inter-American System for the Protection of Human Rights*, 25 NOVA L. Rev. 411, 426 (2001).

<sup>39</sup> *Id.*

<sup>40</sup> Jehovah's Witnesses v. Republic of Argentina, Case 2137, Inter-Am. Comm'n H.R., Report No. 45/78, OEA/Ser.L./V.II.47, 1 1.

<sup>41</sup> 2017 Report of the Special Rapporteur, *supra* note 23, at 415.

<sup>42</sup> *Id.*

<sup>43</sup> American Convention, *supra* note 2, art. 13(1).

<sup>44</sup> Advisory Opinion OC-05/85, *supra* note 12, 31.

<sup>45</sup> Ivcher-Bronstein v. Peru, Inter-Am. Ct. H.R., Complaint of the Inter-Am. Comm'n H.R., at 27 (on file with author) [hereinafter Ivcher-Bronstein Complaint].

<sup>46</sup> 2017 Report of the Special Rapporteur, *supra* note 23, at 418.

<sup>47</sup> Herrera-Ulloa v. Costa Rica, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 107, 1 3 (2 July 2004).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 132.

<sup>50</sup> *Id.*

<sup>51</sup> See generally *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>52</sup> American Convention, *supra* note 2, art. 13(3).

<sup>53</sup> Report of the Special Rapporteur for Freedom of Expression 2004, Inter-Am. Comm'n H.R., O.A.S. Doc. OAS/Ser.L/V/II.122, doc. 5, rev. 1, ch. V, 1 9 (2005) [hereinafter 2004 Report of the Special Rapporteur].

<sup>54</sup> Ivcher-Bronstein Complaint, *supra* note 45.

<sup>55</sup> Canese v. Paraguay, Judgment, Inter-Am. Ct. H.R. (ser. C) No.111, 72(g) (31 Aug. 2004).

<sup>56</sup> *Id.* at 107.

<sup>57</sup> *Id.* at 106.

<sup>58</sup> See Perozo et al. v. Venezuela, judgment, Inter-Am. Ct. H.R. (ser. C) No. 195, 118 (28 Jan. 2009); see also Rios et al. v. Venezuela, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 194, 1 108 (28 Jan. 2009).

<sup>59</sup> Perozo et al. v. Venezuela, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 195, 161.

<sup>60</sup> Report of the Special Rapporteur for Freedom of Expression 2003, Inter-Am. Comm'n H.R., O.A.S. Doc. OAS/Ser.L/V/L1 18, doc. 70, rev. 2, vol. III, ch. V, 12 (2003).

<sup>61</sup> 2017 Report of the Special Rapporteur, *supra* note 23, at 417.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 265.

<sup>65</sup> *Id.* at 266.

<sup>66</sup> Advisory Opinion OC-5/85, *supra* note 12, 34.

<sup>67</sup> *Id.*

<sup>68</sup> Ivcher-Bronstein Complaint, *supra* note 45, at 28.

<sup>69</sup> *Id.*

<sup>70</sup> 2004 Report of the Special Rapporteur, *supra* note 53, ch.V, 36 (citing Press Release, Office of the Special Rapporteur on the Freedom of Expression, Inter-Am. Comm'n H.R., Upon Concluding his Official Visit to Honduras, the Special Rapporteur for Freedom of Expression Urges the Government to Abolish the Required Association of journalists and the Crime of Desacato (2003)).

<sup>71</sup> 2017 Report of the Special Rapporteur, *supra* note 23, at 420 (e.g. Nicaragua and Ecuador).

<sup>72</sup> *Id.* (e.g. Bolivia and Colombia).

<sup>73</sup> *Kimel v. Argentina*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 177 (2 May 2008).

<sup>74</sup> *Id.* at 57. See also Advisory Opinion OC-05/85, *supra* note 12, at 34.

<sup>75</sup> American Convention, *supra* note 2, art. 13(4). The rejection of prior censorship is so strong in the Inter-American system that paragraph 5 provides only subsequent criminal punishment for war propaganda and incitements to racial and religious hatred: Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law. *Id.* art. 13(5).

<sup>76</sup> *Id.* art. 13(2).

<sup>77</sup> Report of the Office of the Special Rapporteur for Freedom of Expression 2006, Inter-Am. Comm'n H.R., O.A.S. Doc. OEA/Ser.L.N./II.127, doc. 4, rev. 1, ch. II, 41 (3 Mar. 2007) (quoting Inter-American Declaration of Principles on Freedom of Expression, Inter-Am. Comm'n H.R., 108th Reg. Sess., approved 19 Oct. 2000, principle 5).

<sup>78</sup> American Convention, *supra* note 2, art. 11:

1. Everyone has the right to have his honor respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
3. Everyone has the right to the protection of the law against such interference or attacks.

<sup>79</sup> Martorell v. Chile, Case 11.230, Inter-Am. Comm'n H.R., Report No. 11/96, OEA/Ser.L/V/11.95, doc. 7 rev., 1 63 (1996).

- <sup>80</sup> *Id.* at 62, 65, 75.
- <sup>81</sup> *Id.* at 71 (*quoting* The Sunday Times v. the United Kingdom, 2 Eur. Ct. H.R. 245 (1979)).
- <sup>82</sup> Olmedo-Bustos et al. v. Chile, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 73, 61 (5 Feb. 2001).
- <sup>83</sup> *Id.* at 61(h).
- <sup>84</sup> *Id.* at 61(i).
- <sup>85</sup> *Id.* at 61(e).
- <sup>86</sup> *Id.* at 72.
- <sup>87</sup> Report of the Office of the Special Rapporteur for the Freedom of Expression 1998, Inter-Am. Comm'n H.R., O.A.S. Doc. OEA/Ser.L/V/II.102. doc. 6, ch. IV, § A, at 21 (16 Apr. 1999) [hereinafter 1998 Report of the Special Rapporteur].
- <sup>88</sup> American Convention, *supra* note 2, art. 13(4).
- <sup>89</sup> *See id.* art. 27.
- <sup>90</sup> Kimel v. Argentina, Judgment, Inter-Am. Ct. H.R. (ser. C) No.177 (2 May 2008).
- <sup>91</sup> *Id.* at 41.
- <sup>92</sup> *Id.*
- <sup>93</sup> *Id.* at 41-42.
- <sup>94</sup> *Id.* at 42.
- <sup>95</sup> *Id.* at 43.
- <sup>96</sup> *Id.* at 45.
- <sup>97</sup> *Id.* at 95.
- <sup>98</sup> 1994 Annual Report of the Inter-Am. Ct. H.R., O.A.S. Doc. OEA/Ser.L/V.88, doc. 9, rev. 1, ch. V, (1995).
- <sup>99</sup> Office of the Special Rapporteur for Freedom of Expression, Inter-American Legal Framework Regarding the Right to Freedom of Expression, O.A.S. Doc. OEA/Ser.L/V/II CIDH/RELE/INF.2/09, at 10 (30 Dec. 2009).
- <sup>100</sup> 2017 Report of the Special Rapporteur, *supra* note 23, at 416 (e.g. Ecuador, El Salvador, Guyana, Mexico, Peru, and Venezuela).
- <sup>101</sup> American Convention, *supra* note 2, art. 13(1).
- <sup>102</sup> Advisory Opinion OC-05/85, *supra* note 12, at 70.
- <sup>103</sup> *Id.* at 42.
- <sup>104</sup> American Convention, *supra* note 2, art. 14.
- <sup>105</sup> Advisory Opinion OC-07/86, (ser. A), No. 7, 25, Inter-Am. Ct. H.R. (29 Aug. 1986).
- <sup>106</sup> *Id.* at 5 (Separate Opinion of Judge Hector Gros Espiell).
- <sup>107</sup> *Id.*
- <sup>108</sup> American Convention, *supra* note 2, art. 27.
- <sup>109</sup> 1999 Report of the Rapporteur for Freedom of Expression, Inter-Am. Comm'n H.R., O.A.S. Doc. OEA/ser.L.N./II.106, doc. 6, Vol. III, Annex 5 (1999) (explaining that the Declaration of Chapultepec, drafted by the Inter-American Press Society and adhered to by several member countries, affirms that the battle for freedom of expression and of the press, by whatever means, is an essential cause of democracy and of civilization in the hemisphere).

- <sup>110</sup> Advisory Opinion OC-05/85, *supra* note 12, at 70.
- <sup>111</sup> *Id.*
- <sup>112</sup> 1998 Report of the Special Rapporteur, *supra* note 87, at 4.
- <sup>113</sup> Resolution 1080 (XXI-0/91), Representative Democracy, OAS Fifth Plenary Session (5 June 1991).
- <sup>114</sup> *Id.*; Inter-American Democratic Charter, adopted 11 Sept. 2001, OEA/Ser.G/CP-1, art. 20 (2003).
- <sup>115</sup> *See generally id.*
- <sup>116</sup> *Id.* at art. 4.

## Sobre el autor

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Claudio Grossman is Professor of Law, Dean *Emeritus*, and the Raymond Geraldson Scholar for International and Humanitarian Law at The American University Washington College of Law (WCL). Professor Grossman served as WCL dean from 1995-July 2016, at which time he decided to return to the faculty.

He was elected to the United Nations International Law Commission in November 2016 for a five-year term, and previously served as member (2003-2015) and chairperson (4 terms, from 2008-2015) of the United Nations Committee against Torture, and was elected and served as chair of the UN Human Rights Treaty Bodies for a one-year term in 2013.

Professor Grossman has served as President of the Inter-American Institute of Human Rights since 2014, following three years on its

Board of Directors; as well as the boards of the Robert F. Kennedy Center for Justice & Human Rights, the Governing Board of the International Association of Law Schools, the American Bar Association's Rule of Law Initiative, and the Open Society Justice Initiative of Open Society Foundations.

He also served as President of the College of the Americas (COLAM), an organization of approximately 400 colleges and universities in the Western Hemisphere (November 2003-November 2007); Chair of the Committee on International Cooperation of the Association of American Law Schools (November 2005-November 2009); and as a member of the Commission for the Control of Interpol's Files (February 2005-March 2011).

In addition, he was a member of the Inter-American Commission on Human Rights (IACHR) from

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Professor Grossman participated in missions to Argentina, Brazil, Canada, Chile, Colombia, the

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